IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH

CWP No. 16930 of 2007

Date of Decision: 2.11.2007

M/s Atma Tube Products Ltd.

…Petitioner

Versus

Debt Recovery Appellate Tribunal and another

…Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. Anand Chhibbar, Advocate,

for the petitioner.

M.M. KUMAR JUDGE, J.

This petition filed under Article 226 of the Constitution prays for quashing order dated 28.9.2007, passed by the Debt Recovery Appellate Tribunal, New Delhi (for brevity 'the DRAT'), while disposing of Miscellaneous Application No. 300 of 2007 and Miscellaneous Appeal No. 13 of 2007 on a Misc. Application in Misc. Appeal No.13 of 2003 (Annexure P-21). Further quashing of notice dated 14.8.2003, issued by Industrial Finance Corporation of India (for short 'IFCI')-respondent No. 2 (Annexure P-1), under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the Act') has been sought on the ground that the same was sent beyond the prescribed period of limitation, which is barred under

Section 36 of the Act because it does not fulfill the pre-requisites of Sections 13(2), 13(3) and 13(12) of the Act. Still further a direction has been sought directing the IFCI not to take possession of the assets of the petitioner-company or restraining it from taking any other measure under Section 13(4) of the Act pursuant to notice dated 14.8.2003 (P-1).

Brief facts of the case are that on 6.6.1988, the petitioner-company was sanctioned a total term loan of Rs. 500 lacs by the IFCI in participation with the Industrial Development Bank of India Ltd. (for short 'IDBI Ltd.') and Industrial Credit and Investment Corporation of India Ltd. (for short 'ICICI Ltd.'), under the Project Finance Participation Scheme for modernization of its project of manufacture of E.R.W. Steel Tubes, situated at Derabassi, District Mohali (P-2). Rs. 200 lacs each were to be given by the IFCI and IDBI Ltd. and Rs. 100 lacs were to be given by the ICICI Ltd. The loan was to be repaid in 28 quarterly instalments of Rs. 7 lacs each, first instalment starting from 15.4.1990 and last instalment ending on 15.4.1997. As per the terms and conditions settled between the parties, interest at the rate of 11.5% for concessional loan and 14% for normal loan, which were Rs. 160 lacs and Rs. 40 lacs respectively was to be charged.

On 28.7.1988, a bridge loan amounting to Rs. 180 lacs out of total loan of Rs. 500 lacs was disbursed to the petitioner-company. On 30.3.1990, a loan agreement and deed of hypothecation was executed between the petitioner-company and the aforementioned financial institutions (P-5). Subsequently, a mortgage deed dated 14.2.1991 (P-6) was also executed to secure the

loans of Rs. 500 lacs. The petitioner-company could not adhere to the terms of repayment of loans and committed default even at the time of first instalment, which was due on 15.4.1990. After protracted correspondence between the parties when no result could be arrived, the aforementioned financial institutions i.e. IFCI, IDBI Ltd. and ICICI Ltd. recalled the entire loan granted to the petitioner-company and consequently an amount of Rs. 6,47,78,357/- each were demanded by the IFCI and IDBI Ltd. and an amount of Rs. 3,14,87,078/- was demanded by the ICICI Ltd. (P-15, P-16 and P-17 respectively). The matter was initially brought before the Debts Recovery Tribunal, Jaipur Bench, Jaipur by the financial institutions by filing OA No. 24 of 2000, which was subsequently transferred to Chandigarh Bench of the DRT being OA No. 920 of 2001, which is still pending adjudication there. On 6.1.2003, the Presiding Officer, DRT Chandigarh, passed an order, which reads as under:

> " Counsel for the defendants seeks adjournment on the ground that they have submitted one time settlement proposal with the applicant bank on 23.12.2002, however, they have not deposited any amount with their proposal to show their bonafide. It is a very old case and is being adjourned on one ground or other mostly by the defendants. Submissions of one time settlement proposal is not a ground for adjournment, however, 3 weeks time is granted to the defendants to settle the matter under the one time settlement. It is made clear that no further time will be granted for arguments unless the defendants

establishes their bonafide by depositing 25% of the amount of one time settlement as per RBI guidelines. The liberty is given to the defendants to quantify the amount as per RBI guidelines and deposit the same with the applicant bank.

All the misc. applications including application for production of documents will be heard and decided at the time of final judgment. If at the time of final arguments, these documents are required for the just and correct adjudication of the case, it shall be summoned.

Fix 29.1.2003 for final arguments."

The afore-mentioned order 6.1.2003 reflects that the counsel for the petitioner-company had sought adjournment from the DRT on the ground that the OTS proposal made by the petitioner-company, who had filed original application on 23.12.2002, was pending. It was noticed that no amount was deposited alongwith the proposal to show the bona-fide of the petitioner-company. The DRT noticing that it was an old case and has been repeatedly adjourned and the alleged proposal for OTS was not a ground for adjournment, yet it granted adjournment to settle the matter under OTS by observing that no further time was to be granted for arguments unless the petitioner-company establishes its bona-fide by depositing 25 percent of the amount of OTS as per Reserve Bank of India guide-lines. The amount was to be quantified by the petitioner-company as per the RBI guide-lines. The deposit was to be made with the secured creditors-financial institutions.

Feeling aggrieved against the aforementioned order, the petitioner-company filed a Misc. Appeal bearing No. 13 of 2003 before the DRAT. The aforementioned appeal was listed for arguments before the DRAT for 13.8.2007. However, in the meanwhile one of the secured creditors i.e. IDBI Ltd. issued a notice dated 27.4.2007, under Section 13(2) of the Act to the petitioner-company. Against the afore-mentioned notice Misc. Application No. 146 of 2007 was filed for declaring the notice as non-est and to set it aside. A further prayer was made that the IDBI Ltd. be restrained from taking any further proceedings under Section 13(4) of the Act. It is appropriate to notice that the original application No. 920 of 2001 was filed before the DRT by the three financial institutions, namely, IFCI, IDBI Ltd. and ICICI Ltd. against the petitioner-company for recovery of aforementioned amounts. The IFCI is the lead financial institution authorised and empowered to initiate and file recovery proceedings against the petitioner-company. All the afore-mentioned financial institutions have advanced a loan of Rs. 5 Crores to the petitioner somewhere in 1988. A charge was also created on 14.2.1991 when the mortgage deed was executed. The first installment became due on 15.4.1990 for payment of which the petitioner-company committed default. When the order dated 6.1.2003 was passed directing the petitioner-company to deposit 25% of the amount of OTS as per the RBI guidelines, which was subject matter of challenge in Misc. Appeal No.13 of 2003, and it was posted for hearing on 13.8.2007. During the pendency of the appeal a notice dated 14.8.2003, under Section 13(2) of the Securitization Act was

issued by the IDBI Ltd., which was questioned by the petitioner-company before the DRAT by moving Misc. Application No. 339 of 2003 in Appeal No. 13 of 2003. The DRAT stayed the notice dated 14.8.2003, under Section 13(2) of the Act, vide its order dated 10.10.2003, issued by the IFCI on the condition that the petitioner-company was to deposit a sum of Rs. 5 lakhs. The afore-mentioned stay order was passed by the DRAT before insertion of Section 13 (3A) of the Act and the judgment of Hon'ble the Supreme Court in the case of **Mardia Chemicals Ltd. v. Union of India, JT 2004 (4) SC 308**. The law has undergone radical change after the stay order dated 10.10.2003 was passed. Earlier there was no bar on the borrower to prefer an application to the DRT at the stage of issuance of notice under Section 13(2) of the Act, whereas by virtue of insertion of Section 13(3A) that bar has been created. It is only after issuance of notice under Section 13(4) of the Act that Section 17 of the Act would come into play and the petitioner could approach the DRAT. The DRAT after noticing the afore-mentioned position in law dismissed the application of the petitioner-company holding that it was wholly premature. It rejected the argument that it was barred by the provisions of Section 36 of the Act and Article 62 of the Limitation Act, 1963.

Impugning the orders dated 27.7.2007, passed by the DRAT and notice dated 27.4.2007 issued under Section 13(2) of the Act by the IDBI Ltd., the petitioner-company filed C.W.P. No. 11954 of 2007 in this Court and after hearing learned counsel for the parties,

we dismissed the writ petition vide order dated 6.8.2007 by observing as under:-

> " We have thoughtfully considered the submissions made by the learned counsel for the petitioner and express our inability to accept the same. Firstly the main appeal of the petitioner is pending consideration of the DRAT for 13.8.2007 when merits of the controversy are likely to be considered. Moreover, this Court under Article 226 shall not in the present case undertake the exercise to determine whether the debt is barred by Limitation Act or the Recovery of the debt has been claimed within the period of limitation. It is well settled that the question of limitation is a mixed question of fact and law. It is not possible for us to give a positive conclusion that the debt is barred by time because there may be acknowledgment on the part of the petitioner or it may be a running account which may sound into different results. The DRAT may be better equipped to decide these questions. We further find that there is no equity in favour of the petitioner as even the Ist instalment which was due on 15.4.1990 has not been paid. It is well settled that whosoever comes to equity is expected to do equity himself. Therefore, the equitable jurisdiction of this Court under Article 226 of the Constitution would not be available.

> It may be noticed that we were not inclined to make any observation on any of the issues in view of the pendency of the appeal before the DRAT and the pendency of the original application before the DRT. However, on the insistence of the counsel for the petitioner, the afore-mentioned observation has been made. These observations should not be taken as final and neither the DRAT nor DRT feel influenced by it as we have not recorded any conclusion on the merits of the controversy. Therefore, the writ petition is wholly mis-conceived and the same is consequently dismissed.

Now, the DRAT has disposed off aforementioned Misc. Application No. 339 of 2003, vide order dated 28.9.2007 (P-21) by observing that the petitioner-company has no right to challenge the notice dated 14.8.2003 and directed the petitioner-company to file its objections before the IFCI, which is subject matter of challenge in the instant petition.

Mr. Anand Chhibbar, learned counsel for the petitioner-company has argued that the proceedings in the instant case were initiated by the IDBI in the year 2001 before the Debts Recovery Tribunal and at that time the provisions like Section 13(3A) of the Act were not in existence. According to learned counsel, the DRAT has committed a grave error of law by applying those provisions to the instant case by firstly granting permission to the petitioner-company to file objection under Section 13(3A) of the Act and then permitting the IFCI to decide the same. The argument appears to be

that the provisions of Section 13(3A) of the Act would not be applicable to those proceedings which are pending before the DRT or the DRAT, as the amendment made in 2004, has not been made retrospectively. In that regard reliance has been placed on Section 23 of the Amended Act of 2004, incorporating repeal and saving clause to repeal the Ordinance 5 of 2004 and to save the action taken under the Ordinance.

After hearing the learned counsel, we are of the considered view that the writ petition is wholly without any substance. The petitioner-company has earlier approached this Court by filing C.W.P. No. 11954 of 2007, wherein challenge was to notice dated 27.4.2007, issued under Section 13(2) of the Act, which was also issued by the IDBI Ltd. and a prayer was made to restrain the IDBI Ltd. from taking any steps under Section 13(4) of the Act. The aforementioned petition was dismissed vide our order dated 16.8.2007. Learned DRAT has passed an order dated 28.9.2007, directing the petitioner to file representation or raise any objection before the IFCI within a week from the date of the order, which is in turn compliance of Section 13(3A) of the Act. On the filing of any representation/objections those were required to be considered by the IFCI and the decision thereon was to be communicated to the petitioner-company, if the objections were not acceptable by giving reasons. Accordingly, the petitioner-company has filed objections on 3.10.2007 (P-22), which have been rejected by the IFCI on 11.10.2007 (P-23). A perusal of the order/reply to the objections would show that it deals in detail with the plea of limitation raised by

the petitioner-company, disclosing that the loan facilities were advanced to the petitioner-company on 30.3.1990 and the loan agreement provided for re-payment of the same in 28 installments ending on 15.4.1997. It has further been pointed out that the petitioner-company had knowledge of the liability of loan towards financial institutions i.e. IFCI, IDBI Ltd. and ICICI Ltd. In any case, the term loans were secured by first charge on all the immovable and movable properties of the petitioner-company in its balance sheet as on 31.8.1996.

The order further disclosed that the petitioner-company had concealed the fact of sending 10 cheques dated 31.3.1997 in the sum of Rs. 2,50,000/- each and 7 cheques were dis-honoured and were returned with the remarks 'exceeds arrangement'. Even the prosecution in the form of criminal complaint under Section 138 of the Negotiable Instruments Act, 1881, is pending. There is further reply given as to how the petitioner-company was incorrect in assuming that requirements of Section 13(4) of the Act were not complied with and the objection that the accounts were not classified as a Non Performing Asset (NPA) alongwith various other things. Be that as it may, we do not wish to comment upon the conduct of the petitioner-company at this stage lest its case is prejudiced before the DRT and the DRAT or in any further proceedings which may accrue at any forum. In any case, the matter is pending before the DRT and in the event respondents decide to issue notice under Section 13(4) of the Act, the petitioner-company would have additional remedy of appeal challenging the same under Section 17 of the Act.

The argument of the learned counsel that the amendment made in 2004 is sought to be applied retrospectively or those provisions cannot be applied to the case of the petitioner-company is wholly without merit. The DRAT has, in fact, taken the correct course by relegating the petitioner-company to filing of objections under Section 13(3A) of the Act and then by issuing direction to the financial institution to reply to those objections with reasons within statutorily stipulated period of one week. There is significant object of providing an opportunity to a borrower to raise objections under Section 13(3A) of the Act and then requiring the secured creditor to speak about its reasons by communicating the same to the borrower. At this stage the borrower point of view is projected and the record could be straightened up. Those reasons may or may not lead to the issuance of a notice under Section 13(4) of the Act. In case the secured creditor proceeds to issue notice under Section 13(4) of the Act then the petitioner-company would have further cause of action as and when such notice for taking possession of the secured assets is issued, which could be challenged under Section 17 of the Act, by filing an appeal before the DRT by the petitioner-company. At this stage, it cannot be accepted that the direction of the Tribunal for filing of objections by the petitioner-company and communication of reasons by the IFCI was in-appropriate or it suffers from any legal infirmity warranting interference of this Court because the provision is procedural in nature and it emanates from the judgment of the Supreme Court in Mardia Chemicals case (supra). Even otherwise this is a beneficial provision which is aimed at reaching the correct

legal position by furnishing adequate opportunity of hearing to a borrower. Moreover, the petitioner-company has already filed objections which have been rejected by the IFCI and the reasons have been communicated to the petitioner-company which means having taken the chance and after failure the petitioner-company wishes to forestall the action of the IFCI for speedy recovery which is the basic aim of the Act.

For the reasons aforementioned, this petition fails and the same is dismissed. However, we make it clear that any observation made in this order shall not be construed as an expression of opinion on the merit of the controversy. The financial institutions may pass appropriate orders in accordance with law, which may be challenged by the petitioner-company as per remedy available in law, if so advised.

(M.M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

November 2, 2007
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